LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 1 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 85

STEPHEN L. KREZNAR and NOVERA H. SPECTOR,
Petitioners

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SIDNEY DICKSTEIN
DAVID I. SHAPIRO
1411 K Street, N. W.
Washington 5, D. C.

GEORGE KAUFMANN
1730 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

STEPHEN L. KREZNAR and NOVERA H. SPECTOR,
Petitioners

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners Stephen L. Kreznar and Novera H. Spector pray that a writ of certiorari issue to review the Orders of the United States Court of Claims entered in *Kreznar* v. *United States* (No. 47-60) and *Spector* v. *United States* (No. 48-60) on June 22, 1962.

CITATION TO OPINION BELOW

The Court of Claims filed no opinion. The Order of the Court is reprinted in Appendix A, *infra*.

JURISDICTION

The Order of the Court of Claims was entered on June 22, 1962, and a timely motion for reargument and reconsideration was overruled on October 3, 1962. On December 28, 1962 Mr. Justice Brennan entered an order extending the time to file the petition for certiorari until March 1, 1963. This Court has jurisdiction under 28 U.S.C. § 1255.

QUESTIONS PRESENTED

1. Does this Court's decision in *Greene* v. *McElroy*, 360 U.S. 474, contemplate and direct that one deprived of a job by Defense Department officials, whose actions were found by this Court to be unauthorized, shall receive monetary restitution for back pay losses in accordance with applicable regulations (Par. 26, Dept. of Defense Directive 5220.6, 20 Fed. Reg. 1553, February 2, 1955) or the Fifth Amendment to the Constitution of the United States?

2. Was it proper for the Court of Claims to suspend, without reaching the merits, a suit for monetary restitution under the aforesaid 1955 regulation and the Fifth Amendment and to remit the plaintiff to further proceedings before the Department of Defense under DOD Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960?

CONSTITUTION AND REGULATIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution; and Department of Defense Directive 5220.6, 20 Fed. Reg. 1553, issued February 2, 1955; and Department of Defense Directive 5220.6, 25 Fed. Reg. 7523, issued July 28, 1960. These are reprinted in pertinent part in Appendix B, *infra*.

STATEMENT OF THE CASE

I. THE FACTS UNDERLYING PETITIONERS' CLAIMS.

A. Kreznar's Case.

Prior to January 23, 1956 Stephen L. Kreznar was employed by the Wisconsin Telephone Company, Milwaukee, Wisconsin, as a PBX installer. On January 13, 1956 the Industrial Personnel Security Screening Board (IPSSB) determined that Kreznar's continued clearance for access to classified material was not clearly consistent with the interests of national security and on that day issued a "Statement of Reasons" and a suspension of his clearance in accordance with DOD Directive 5220.6, paragraph 17 e, 20 Fed. Reg. 1535, 32 CFR § 67.4-3 (e). Kreznar was notified of the IPSSB's action by the Director, Office of Industrial Personnel Security Review, (OIPSR) on January 16, 1956, who advised him of his opportunity to respond to the Statement of Reasons.

On or about January 23, 1956, petitioner was discharged from said employment as a direct result of the action of the Department of Defense in suspending his security clearance. Thereafter he made written response to the charges against him and requested a hearing before the New York Industrial Personnel Security Hearing Board. Said hearing was held on May 31, 1956. At this hearing Kreznar was not permitted to confront or cross-examine the informants against him.

On September 7, 1956, Kreznar was informed by the Director, OIPSR, that the New York Industrial Personnel Security Hearing Board had determined that Kreznar's clearance for access to classified information was not clearly consistent with the interests of the national security. Kreznar's appeal to the Industrial

Personnel Security Review Board on September 20, 1956 was denied by the Director, OIPSR, on October 3, 1956, in accordance with DOD Directive 5220.6, para. 21b. On October 5, 1956, Kreznar appealed the adverse determination to the Secretary of Defense who, on November 14, 1956, upheld the actions of his subordinates.

On November 21, 1956 Kreznar filed a complaint in the United States District Court for the District of Columbia (*Kreznar* v. *Wilson, et al.*, Civil Action No. 4487-56), praying for a declaratory judgment that the prior actions revoking his security clearance were invalid, arbitrary, illegal and unconstitutional. An answer was filed on February 4, 1957.

On June 29, 1959 this Court decided *Greene* v. *McElroy*, 360 U.S. 474, holding

> "[t]hat in the absence of implicit authorization from either the President or Congress the respondents (Secretary of Defense and others) were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *id.* at 508.

On July 16, 1959 the Court of Appeals for the District of Columbia decided *Spector* v. *McElroy*, 106 U.S. App. D.C. 51, 269 F. 2d 242. Thereafter, on November 6, 1959, the District Court, relying on the authority of both *Greene* and *Spector*, entered an order declaring the prior actions of the Secretary of Defense and his subordinates in revoking Kreznar's security clearance, to be invalidly authorized and expunged all rulings, orders, directives or determinations predicated upon the invalid agency action.

B. Spector's Case.

Prior to May 10, 1954, Novera Herbert Spector was employed as an Experimental Machinist "A" in Department 5521 of the Sperry Corporation (Sperry) in Great Neck, New York. On May 7, 1954, the Inspector of Navy Material cancelled Spector's security clearance on the ground that his "continued access to Department of Defense classified contracts (Army, Navy and Air Force), [was] not clearly consistent with the best security interest of the United States." On May 10, 1954, and as a direct result of the Navy's action cancelling his clearance, Sperry discharged Spector from employment.

On June 7, 1954, the Screening Division, Eastern Industrial Personnel Security Board (EIPSB) advised Spector that it proposed to deny him consent for employment on classified defense contracts and further advised of his opportunity to respond to the proposed denial action in accordance with the provisions of the Defense Department's Industrial Personnel and Facility Security Clearance Regulation issued May 4, 1953.

On August 23, 1954, and after Spector had submitted a written response, the screening Division denied him clearance. On August 31, 1954, Spector duly appealed the Screening Division's adverse ruling to the EIPSB's Appeal Division, and in connection therewith demanded a bill of particulars in order to intelligently prosecute his appeal. Spector's demand for a bill of particulars was denied on September 3, 1954. On February 7 and 9, 1955, Spector was afforded a "hearing" before the EIPSB's Appeal Division, and on February 15, 1955, was notified that the Appeal Division had affirmed the Screening Division's denial action.

Spector thereupon requested a copy of the hearing transcript, which was not furnished until September 12, 1955. Shortly thereafter, Spector's counsel informed the EIPSB's Executive Secretary that the transcript contained numerous omissions and errors and on October 7, 1955, the EIPSB, on its own motion, ordered a *de novo* hearing. This *de novo* hearing was conducted on October 13, 14, and 24, 1955. On November 21, 1955, the EIPSB's Appeal Division reaffirmed the Screening Division's denial action of August 23, 1954. This decision was sustained by the Industrial Personnel Security Review Board (IPSRB) on June 20, 1956 pursuant to Department of Defense Directive 5220.6 20 Fed. Reg. 1553, issued February 2, 1955, which had superseded the Industrial Personnel and Facility Security Clearance Regulation of May 4, 1953. A further appeal was taken to the Secretary of Defense, who upheld the actions of his subordinates. In none of these proceedings was Spector afforded the opportunity to confront or cross-examine the informants against him.

On November 24, 1956, Spector filed a complaint in the United States District Court for the District of Columbia (*Spector* v. *Wilson, et al.*, Civil Action No. 4514-56), praying for a judgment declaring the prior actions revoking his security clearance to be invalid, arbitrary, illegal, and unconstitutional. An answer was filed on February 8, 1957. Subsequently, on cross-motions for summary judgment an order was entered on November 14, 1957, granting defendants' motion for summary judgment and dismissing Spector's complaint. Spector thereupon appealed to the Court of Appeals.

On July 16, 1959 the Court of Appeals, relying on the authority of *Greene* v. *McElroy, supra,* reversed the judgment of the District Court. 106 U.S. App. D.C. 51, 269 F. 2d 242. On remand, the District Court entered an order on November 6, 1959, declaring the actions of the Secretary of Defense and his subordinates in revoking Spector's security clearance, to be invalidly authorized and expunging all rulings, orders, directives or determinations predicated upon the invalid agency action.

II. PROCEEDINGS IN THE COURT BELOW.

On February 5, 1960 Kreznar and Spector filed separate petitions in the United States Court of Claims seeking monetary restitution for the loss of earnings due to the unauthorized revocation of their security clearance. On September 19, 1960 the United States filed motions to suspend proceedings in the two cases because of the asserted pendency of administrative proceedings within the Department of Defense. The motions relied on Executive Order 10865, 25 Fed. Reg. 1583 issued on February 20, 1960 and the implementing regulation Department of Defense Directive 5220.6, 25 Fed. Reg. 7523 issued July 28, 1960. This regulation was adopted in consequence of the decision in *Greene* v. *McElroy.* It prescribes the standards and procedures for determining whether employees of defense contractors shall have access authorization (security clearance). Parenthetically, neither petitioner is now employed by defense contractors nor do they seek access authorization.

The 1960 regulation, while revising some of the procedures under the 1955 regulation, still permits a determination adverse to the applicant without giving him

the opportunity to confront and cross-examine informants against him. It further provides that decisions prior to its effective date "may be reconsidered * * * after a finding by the appropriate board that there is newly discovered evidence or that other good cause is shown. Authority is also delegated to the director of the office of Industrial Personnel Access Authorization Review to "vacate a previous determination found to have been unauthorized at the time it was made and to take such other steps as may be determined necessary to complete reconsideration of the case." Finally, the regulation provides that "if an applicant suffers a loss of earnings resulting directly from a suspension, revocation, or denial of his access authorization," and at a later time a final administrative determination is made that the granting to him of such clearance "would be clearly consistent with the national interests," and if it is further determined that the prior denial of clearance "was unjustified", the reimbursement of such loss of earnings may be allowed.

On December 22, 1960 an Order was entered by Commissioner McConnaughey, denying the motion to suspend proceedings and directing the defendant to answer within 30 days. On February 23, 1961 the answer was filed. On March 7, 1961 petitioners filed a joint motion for summary judgment. On September 13, 1961 the Government responded to Kreznar's motion for summary judgment and filed its own alternative motion for summary judgment or to suspend proceedings. On October 9, 1961, a similar paper was filed in Spector's case. Thereafter, oral argument was heard by the Court of Claims on the motions of the respective parties. On June 22, 1962 the court ordered

that further proceedings be suspended. The court filed no opinion, and its Order reads in full as follows:

> "These cases come before the court on plaintiffs' motions for summary judgment and defendant's alternative motions for summary judgment or to suspend proceedings. Upon consideration thereof, together with the opposition thereto, the briefs of the parties and the oral argument of counsel,
>
> IT IS ORDERED that further proceedings, including action with regard to the motions for summary judgment, be and the same are suspended pending plaintiffs' pursuit and completion of the administrative remedies available through the Department of Defense, which proceedings are to be instituted and completed within a reasonable time."

On October 3, 1962 the court overruled petitioners' joint motion for reargument and reconsideration of the decision of June 22. On December 5, 1962 the court overruled petitioners' joint motion for leave to file for rehearing and reconsideration, which motion was based upon the inconsistent decision of the Commissioner in *Greene* v. *United States*. On the same day, the Commissioner, *sua sponte*, reconciled his order in *Greene* to the court's order in *Spector* and *Kreznar*.

REASONS FOR GRANTING THE WRIT

The questions presented and the reasons for granting certiorari are the same herein as in *William L. Greene* v. *United States* in which a Petition for Certiorari is being filed this day. We respectfully request the Court to consider the discussion of the reasons for granting the writ presented in Greene's Petition as the reasons for granting the present petition.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

SIDNEY DICKSTEIN
DAVID I. SHAPIRO
1411 K Street, N. W.
Washington 5, D. C.

GEORGE KAUFMANN
1730 K Street, N. W.
Washington 6, D. C.

Attorneys for Petitioners